

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0197-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
AARON ANTONIO BEALE,)	Not for Publication
)	Rule 111, Rules of
Petitioner.)	the Supreme Court
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400391

Honorable James L. Conlogue, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney
By Valerie K. Aronoff

Bisbee
Attorneys for Respondent

Jeffrey G. Buchella

Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Following a jury trial, Aaron Antonio Beale was convicted of possessing a dangerous drug and drug paraphernalia. The trial court sentenced him to presumptive terms of 4.5 and 1.75 years' imprisonment, to be served concurrently with each other and with the sentences imposed on him in CR200500667. Beale filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., encompassing both cases. After an evidentiary hearing, the trial court denied relief in separate minute entry orders, and this petition for review followed.¹ We grant review to determine whether the trial court's denial of post-conviction relief constituted an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We deny relief.

¶2 Beale argued in his petition below that his trial counsel was ineffective in "failing to adequately communicate the terms of" a plea offer that would have resolved this case and the charges in CR200500667. The agreement required Beale to plead guilty to two counts in CR200500667 and, in this case, one count of weapons misconduct involving possessing a gun as a prohibited possessor, a charge of which the jury eventually found him not guilty. The plea agreement provided the sentences imposed in the separate cause numbers would "run consecutive[ly] to each other for the total amount of nine years." The maximum sentence authorized for the weapons misconduct charge was 3.75 years.

¹Beale filed a separate petition for review in CR200500667, which we address in a separate memorandum decision.

¶3 At the change-of-plea hearing, however, Beale failed to provide a factual basis for the weapons misconduct charge. Although he stated he had received sufficient time to discuss his situation with his attorney and understood the plea agreement, when asked specifically whether he had possessed “the han[dg]un as explained,” he answered “no” and told the trial court the guns had been under a bed and he had not had access to them. The prosecutor briefly explained the concept of constructive possession, and the court recessed to allow Beale to speak to his attorney. After the recess, counsel told the court Beale was not ready to go forward with the plea and asked for “a little more time to review it and discuss it further.” The court set a “review hearing/change of plea” for January 31, 2006, a week before the scheduled trial date, but that hearing never took place.² Beale attempted to accept the plea agreement on the morning of trial, but the prosecutor had withdrawn the offer.

¶4 To prove ineffective assistance of counsel, a petitioner must show that counsel’s performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to make a sufficient showing of either element of the *Strickland* test, the claim necessarily

²Beale contends in his petition for review that “the record does not reflect any decision by the trial court to schedule a hearing on January 31[]”; however, the court’s minute entry order from the hearing on January 24, 2006, clearly shows the court set the review or change-of-plea hearing for that date.

fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). In this case, the trial court found no inadequate performance by trial counsel and no prejudice. We find no abuse of discretion in the court's order denying post-conviction relief.

¶5 At the evidentiary hearing, Beale acknowledged the prosecutor had explained constructive possession during the change-of-plea hearing and admitted his counsel had again gone over the issue with him during the recess. He also admitted that, at the change-of-plea hearing, he was “still concerned about the time issue” in the case and “w[as] upset that [he] w[as] going to jail for nine years.” He stated he had decided the day before trial, after further discussion with counsel, that he was “able to go through with the change of plea.”

¶6 Trial counsel testified that he had conducted detailed conversations with Beale about this case and CR200500667 and that Beale's “main concern” had been “the amount of time that he was likely to be facing.” Counsel stated that he had discussed the terms of the plea agreement with Beale the day before the change-of-plea hearing and reviewed the written agreement with him on the day of the hearing. He remembered no “unanswered questions” Beale had after the recess during the change-of-plea hearing, and he did not remember Beale's claiming not to understand constructive possession at that point. Counsel stated: “What I do remember is [Beale's] stating essentially that he couldn't do it,” that “for whatever reason, [Beale] didn't want to go ahead with proceeding with the nine year sentence,” and that he had no “impression of any specific term other than he didn't want to

do it.” Based on this evidence, the trial court did not abuse its discretion in determining there had been no inadequate performance by trial counsel in explaining the plea agreement and the issues related to it.

¶7 Beale also suggests that trial counsel “had not discharged his duties in communicating with [the prosecutor] about [Beale’s] wishes” and implies that, had counsel contacted the prosecutor earlier than the day before trial to convey Beale’s desire to accept the plea agreement, the plea would have gone forward. But the record does not show exactly when the prosecutor withdrew the plea offer nor contain any evidence that Beale would have agreed to accept the plea before it was withdrawn. As noted above, Beale testified that he had decided only the day before trial to accept the plea offer. There is no evidence that any action on counsel’s part would have resulted in Beale’s making an earlier decision.

¶8 Finally, Beale contends the trial court abused its discretion by implicitly concluding the state had not been estopped from withdrawing the plea agreement. Absent misconduct, a prosecutor has plenary authority to withdraw a plea offer at any time prior to the court’s acceptance of the plea agreement. *See* Ariz. R. Crim. P. 17.4 (b). Beale argues, however, that the state was estopped from withdrawing the plea offer because the prosecutor had stated at the change-of-plea hearing that, “if [Beale] decides he wants to plead, he can notify the Court.” But the prosecutor made that statement in the context of discussing whether the court should set another change-of-plea hearing before trial. The prosecutor

had earlier stated that, although he could not speak for the prosecutor assigned to the case,³ because the plea had been “based on the representation” that a change-of-plea hearing would be conducted that day, the assigned prosecutor “may or may not keep the offer open.” Under these circumstances, the court did not abuse its discretion by implicitly concluding the state was not estopped from withdrawing the plea offer.

¶9 Because we have determined that Beale failed to show deficient performance, we need not address his argument regarding the trial court’s finding that he had suffered no prejudice. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945. Although we accept review of Beale’s petition, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge

³Apparently the prosecutor at the January 24, 2006, change-of-plea hearing was appearing for another attorney.